Ashurst Australia
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Employment Alert

"Scab" decision overturned: Full Federal Court upholds termination

BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FCAFC 132 (13 December 2013)

WHAT YOU NEED TO KNOW

- The decision concerns the dismissal of an employee who repeatedly held and waved a sign with the words "No principles SCABS No guts" at a protest that occurred during a period of protected industrial action.
- The majority of the Full Court of the Federal Court of Australia has overturned Justice Jessup's first instance decision in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* [2012] FCA 1218, setting aside orders that the employee concerned be reinstated and that the company pay a pecuniary penalty.
- The decision is important, as it confirms that the High Court's decision in *Barclay* (see our *Employment Alert* dated 7 September 2012) establishes that engagement in industrial activity may be closely related to a decision to take adverse action without necessarily being the *cause* of such a decision.
- The decision also confirms that employers are free to regulate the way in which employees treat one another and in fact, that they have a duty to do so, provided that their reasons for regulating behaviour are not prohibited.

WHAT YOU NEED TO DO

- Employers should continue to ensure that the reasons for all disciplinary decisions and other decisions that could amount to adverse action are well documented. This decision confirms that regard will be had to the evidence of the decision-maker in light of the established facts in deciding whether adverse action has been taken for an unlawful reason.

In a 2-1 decision, the Full Court of the Federal Court of Australia has overturned the decision of the Federal Court of Australia in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* [2012] FCA 1218.

Background – how did this all come about?

During the negotiations for the *BMA Enterprise Agreement 2012*, protected industrial action in the form of stoppages of work was taken by employees at the mine sites in the Bowen Basin in Queensland that were to be covered by the enterprise agreement. During the protected industrial action in February 2012, a protest was organised at the entrance to the Saraji Mine by the Saraji Mine Lodge of the CFMEU. Henk Doevendans was the Vice President of the Saraji Mine Lodge at that time and attended a number of the protests that occurred at the entrance to the Saraji Mine.

On a number of occasions during his attendances at the protest at the entrance to the Saraji Mine, Mr Doevendans was observed to have held and waved a sign that read "No Principles SCABS No Guts" at vehicles entering and leaving the Saraji Mine.

Following a thorough investigation, the company was satisfied that Mr Doevendans had held and waved the Scab Sign on three occasions during the protest that had occurred at the entrance to the Saraji Mine in February 2012. A show cause process was then initiated. At the conclusion of the show cause process, the General Manager of the Mine implemented the company's Just Culture Decision Tree process and

determined that termination of Mr Doevendans' employment was the only appropriate outcome.

Relevantly, the General Manager gave evidence that the only considerations that were in his mind as reasons for his decision to terminate Mr Doevendans' were:

- Mr Doevendans held and waved a sign with the word 'scab' on more than one occasion;
- Mr Doevendans had a choice of signs in the protest area, but deliberately and repeatedly held and waved the Scab Sign;
- Mr Doevendans admitted to the allegations about his conduct;
- Mr Doevendans acknowledged that he knew his conduct was inappropriate and contrary to the company's Charter Values and Workplace Conduct Policy;
- Mr Doevendans did not accept that he had done anything wrong; and
- The General Manager doubted whether Mr Doevendans was capable of being rehabilitated to the just culture he was developing and had developed at the Saraji Mine.

Further, the General Manager gave evidence that these considerations "*…left me with the powerful impression that …termination was the only appropriate outcome. I asked myself 'do I want an individual at Saraji Mine who has demonstrated a lack of contrition, low potential to change or modify his behaviour and who is unwilling to learn any lesson from this incident?'. My answer was 'no'.*"

Following the termination of Mr Doevendans' employment, the CFMEU brought a general protections application in the Federal Court alleging that the dismissal amounted to adverse action because Mr Doevendans:

- Had participated in protected industrial action;
- Was a member and/or an officer of the CFMEU;
- Had been participating in a lawful activity organised by an industrial association; and
- Had been representing or advancing the views, claims and interests of an industrial association.

Decision at first instance

At first instance, Justice Jessup of the Federal Court of Australia held that the company had taken adverse action against Mr Doevendans in terminating his employment. Justice Jessup accepted without qualification the General Manager's evidence that Mr Doevendans' employment was terminated because his conduct in holding and waving the Scab Sign was contrary to the employer's policies, culture and expectations for the conduct of its employees.

However, Jessup J nevertheless held that the company had dismissed Mr Doevendans for having participated in an industrial activity organised by an industrial organisation and for having represented or advanced the views, claims or interests of the CFMEU, which in his view included castigating other CFMEU members who did not participate in the industrial action. In doing so, Jessup J acknowledged that the use of the word 'scab' is "*conspicuously offensive language*" in an industrial context. Jessup J ordered that Mr Doevendans be reinstated and imposed a penalty on the company.

Decision of the majority of the Full Court of the Federal Court

The Full Court was constituted by Justices Dowsett, Kenny and Flick. While delivering separate judgments, Justices Dowsett and Flick both determined that the appeal should be allowed and the orders made by Jessup J be set aside.

While Justice Dowsett noted that Justice Jessup's reasons were "*both careful and comprehensive*", he held that it was "*impossible to reconcile his findings and conclusions with the High Court's decision in Barclay*" and that Justice Jessup's finding that Mr Doevendans' participation in industrial action or industrial activities played no part in the General Manager's decision making process *"disposed of the matter"*. Further, Justice Dowsett held that whether "*the impugned conduct may have fallen within any of the categories of conduct identified in s 347 was irrelevant*".

Justice Dowsett also held that the High Court's decision in *Barclay* establishes that the fact that an employee participates in an industrial activity or represents or advances the views, claims or interests of an industrial association does not necessarily lead to the conclusion that adverse action was taken *because* of such engagement: "*…Barclay establishes that engagement in industrial activity may be closely related to a decision to take adverse action, without necessarily being the cause of such decision."*

Accordingly, Justice Dowsett held that while an employee may act in a way that brings them within the protections of the general protection provisions of the *Fair Work Act 2009* (Cth), they may nevertheless take that action in a way or in circumstances that causes the employer to act adversely against them

"*not because of the employees' engagement in industrial activity, but because of other concerns*". Importantly, His Honour further held that *"…employers may regulate the way in which employees treat one another. Indeed, an employer has a duty to do so.*" Justice Dowsett also held that "*Unions and union members have no inalienable right to use the word* ['scab'] *in the course of industrial action. Employers have no inalienable right to prevent its use.*"

Similarly, Justice Flick held that Justice Jessup had erred, as the General Manager's reasons for dismissing Mr Doevendans *"…extended beyond the mere fact that he waved the scabs sign and had 'deliberately and repeatedly held and waved' that sign. … as found by the Primary Judge, the reasons for the dismissal were far more extensive and included (for example): his arrogance when confronted; the fact that the waving of the sign was contrary to the policy of BHP Coal; and the fact that Mr Doevendans' conduct was antagonistic to the culture sought to be developed at the mine…. And…'the fact that he was engaged in industrial action or activity, did not play any part in his decision making process'."*

Justice Flick concluded that Justice Jessup was in error in "*seizing upon one aspect of the conduct engaged in by Mr Doevendans, namely his participation in the protest or his advancing the views of the union, and placing to one side the reasoning process of* [the General Manager]", which resulted in Justice Jessup not addressing the factual inquiry of whether the company took adverse action against Mr Doevendans "because" he had engaged in industrial activity or represented or advanced the views or interests of the CFMEU.

While in dissent, Justice Kenny agreed with Justices Dowsett and Flick that Justice Jessup erred in holding that Mr Doevendans was dismissed for having participated in a lawful activity organised by an industrial association. Justice Kenny held that Justice Jessup was in error, as His Honour was *"… obliged to consider all the relevant evidence, especially that of* [the General Manager] *as to why he decided to terminate Mr Doevendans' employment (which the primary judge had accepted without qualification). This evidence showed clearly* [the General Manager's] *reasons for dismissing Mr Doevendans did* ***not*** *include Mr Doevendans' participation in the general protest. …* [The General Manager's] *evidence …ruled out the possibility that Mr Doevendans was dismissed 'because' he participated in the 'general protest'… Rather, …Mr Doevendans was dismissed because of what he did in the course of participating in the protest. This was* ***not*** *equivalent to dismissing him 'because' he participated in the protest …An activity is not insulated from adverse action by an employer because it "happens to be" done in the course of otherwise lawful industrial activity. The approach taken by his Honour was, so it seems to me, redolent of this kind of error."*

However, Justice Kenny did not agree with Justices Dowsett and Flick that Justice Jessup had erred in holding that Mr Doevendans was dismissed for having represented or advanced the views, claims and interests of an industrial association. Her Honour held that it was "*…self-evidently open to the primary judge to hold that the views and interest being represented by Mr Doevendans in holding up the sign were those of an industrial association."*

Further, Justice Kenny commented that *"…some care must be taken in considering alleged breaches of an employer's good conduct policies. Without re-introducing the chain of reasoning rejected in Barclay…, it seems to me that, in taking adverse action against an employee, an employer can sometimes, but not always, rely on a contravention of a good conduct policy (and like workplace charters and protocols) as a non-prohibited reason to take adverse action."* However, Justice Kenny was of the view that in the present case, the company could not avoid the prohibitions in section 346 by relying on its own good conduct policy as a shield.

Implications of the decision

This decision confirms that if a decision maker's reasons for taking adverse action do not disclose any prohibited reason, then that should be the end of the matter. In this way, employees will not necessarily be immune from disciplinary action for any misconduct, no matter how serious, merely because that misconduct is part of an activity organised or promised by an industrial association or because the employee is representing or advancing the views or interests of an industrial association. Accordingly, employers should continue to ensure that the reasons for all disciplinary decisions and other decisions that could amount to adverse action are well documented.

It is not yet known whether the CFMEU will make an application for special leave to appeal the Full Court's decision to the High Court of Australia.

Authors

Vince Rogers
Partner
Brisbane
T: +61 7 3259 7285
E: vince.rogers@ashurst.com

Tamara Gillies
Senior Associate
Brisbane
T: +61 7 3259 7334
E: tamara.gillies@ashurst.com

Employment contacts

Brisbane	Ian Humphreys, Vince Rogers, James Hall	T: +61 7 3259 7000
Canberra	Paul Vane-Tempest	T: +61 2 6234 4000
Melbourne	Steven Amendola, Richard Bunting	T: +61 3 9679 3000
Perth	Marie-Claire Foley, Rob Lilburne, David Parker	T: +61 8 9366 8000
Sydney	Lea Constantine, Jennie Mansfield, Helen McKenzie, Adrian Morris, Stephen Nettleton, Stephen Woodbury	T: +61 2 9258 6000